

In the
Court of Appeals for the
Fifth District of Texas at Dallas

MICHAEL GLEN HAMILTON,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

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No. 05-09-00294-CR

Trial Number 219-82824-07 in the 429th District Court of Collin County
The Honorable Quay Parker, Judge Presiding by Assignment

STATE'S BRIEF

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*Oral argument is requested,
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Appellant did not preserve his complaint because he did not object to the prosecutor’s jury argument until the day after it was given. Additionally, the complained-of argument was proper both as a reasonable deduction from the evidence and as an answer to the argument of opposing counsel. Finally, looking at the *Mosley* factors, the argument did not prejudice Appellant, particularly in light of the volumes of vile evidence of Appellant’s sexual depravity that the jury later heard; Appellant did not request a curative instruction; and Appellant’s punishment was certain given the evidence of his abuse of a ten year old, the pornography he created of her, and his massive array of child pornography. Appellant’s sole point of error should be overruled.

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No. 05-09-00294-CR

Trial Number 199-81416-07 in the 199th District Court of Collin County
The Honorable Webb Biard, Judge Presiding by Assignment

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant was indicted on two counts of aggravated sexual assault of a child and three counts of indecency with a child. CR 5-6. He initially pleaded not guilty to all counts (2 RR 164) but changed his plea to guilty during trial. 5 RR 43; CR 93, 96. A jury sentenced him to life in prison for each of the aggravated sexual assault of a child counts, the sentences to run consecutively. 7 RR 176-77, 181-82; CR 93, 96. On the indecency with a child counts, the jury sentenced him to twenty, fifteen, and fifteen years in prison, the sentences to run concurrent with the first life sentence. 7 RR 178-79, 182-83; CR 99, 102.

STATEMENT OF FACTS

Appellant molested B.W.

When B.W. was ten years old, her mother Kim and thirty-two-year-old Appellant were best friends. 2 RR 185; 4 RR 4, 5, 48. When they first met, Appellant lived in Arlington with a couple who was also friends with Kim. 3 RR 114; 7 RR 18. Kim, B.W., and B.W.'s brother would visit the couple and see Appellant. 3 RR 114; 4 RR 63; 7 RR 21, 23-24. A few months later, Appellant moved to Plano to live with his cousin. 3 RR 115; 7 RR 18. Kim and her children would spend the weekend with Appellant about twice a month. 3 RR 116; 7 RR 39-40.

Appellant considered Kim vulnerable (7 RR 103), and B.W.'s father was not a part of their life. 4 RR 6, 47. According to Appellant, he became a "father figure" to B.W. 3 RR 56, 102. According to B.W., he talked about being her boyfriend, took her to get her nails done, and bought her things. 4 RR 6, 21-23, 33. He hugged her, told her she was pretty, and said he loved her. 4 RR 34.

Appellant began to sexually assault B.W. in Arlington. One night when Kim and her children spent the night at the couple's house, B.W. woke up to find Appellant in bed with her and touching her vagina, moving his hands in circles. 4 RR 16-18. When she visited Appellant in his Plano house and went into his bedroom to ask him about dinner, he would get off his computer, push her back, put his hand over her mouth, pull her shorts aside, and put his fingers in her vagina. 3 RR 9; 4 RR 20-21, 29-30; *see also* 3 RR 12; 4 RR 18. He would not stop even though she told him to, and he caused her to bleed

when he rubbed her with long fingernails. 4 RR 21, 22. He also touched her breasts with his hands (4 RR 28-29) and forced her to touch and squeeze his penis. 4 RR 22-24.

Once when she had changed clothes in Appellant's bedroom, B.W. noticed he had set up a camera to record her. 4 RR 19. When Appellant later checked the camera and realized B.W. had deleted the recording, he repeatedly questioned her about it and did not seem to understand that she would not want to be recorded. 4 RR 19-20.

One day in his Plano house, Appellant wanted her to perform oral sex on him, and when she kept her mouth shut he became angry. 4 RR 24. The next day she was sleeping because she had been ill and vomiting. 4 RR 26. She woke to find her shorts down and Appellant's penis inside her vagina. 4 RR 26. Appellant was moving up and down, and when she told him he was hurting her, he told her "I don't care." 4 RR 28-29. A few days later, Appellant told her that if she did not give him oral sex or if she told her mother, she could not come to his house anymore. 4 R 30-31. He also told her that if she told her mother, he would kill her. 4 RR 31.

Appellant took pornographic pictures of B.W.

One night when B.W. was asleep on the floor of Appellant's bedroom in the Arlington home, Appellant pulled her underwear aside and took a picture of her vagina. 7 RR 65; SX 3 at 6; SX 13, 28. At trial, he testified that it excited him to be able to get away with it. 7 RR 66.

He went on to take numerous other pornographic pictures of her. 3 RR 38-42, 44-46; SX 2-5, 6-35. Some were close-ups of her exposed vagina and of her pantied crotch. SX 3 at 6, 7-10, 15, 18-21; SX 21, 25-31. He told her to touch the crotch of her panties,

and he took pictures. 4 RR 8-9; SX 33, 34. He told her to grab her breasts through her shirt and to lift up her shirt, and he took pictures. 4 RR 10, 11; SX 15, 22, 23. He taught her how to “flip someone off” then took pictures of her doing that while holding and sucking on a bottle of Mike’s Hard Lemonade.¹ 4 RR 14; SX 14, 16. Using his own body, he showed her how to lay back on the bed with her legs spread apart, her hand on her crotch, and her mouth open, and he took pictures. 4 RR 11; SX 20. Again using his own body, he showed her how to lay back with her legs spread apart holding the bottle of Mike’s Hard Lemonade in front of her crotch. 4 RR 15; SX 18. He taught her how to use her fingers to make the sign of a woman giving oral sex to a man, and he took a picture of her doing that. 4 RR 11-12; SX 17. When she was playing outside in the hose with her brother and another girl and went to cinch up the top of her two-piece bathing suit, he instructed her to pull it down instead, and he took pictures 4 RR 15; SX 35. When Appellant was taking these pictures of B.W., he would tell her she looked pretty. 4 RR 9.

Appellant also made a video of B.W. pulling up her shirt, rubbing her breasts, and laughing. 2 RR 176-77; 3 RR 55; SX 5. He kept the pictures and the video on a flash drive, which he wore around his neck at work. 2 RR 174-75; 3 RR 133; SX 1A, 1B. Indeed, it was when he lent the flash drive to a co-worker to download an unrelated movie that the pornography was discovered and he was arrested. 2 RR 175-76, 182-83.

At trial, B.W. testified that these pictures made her sick to her stomach. 4 RR 15. She was shocked and upset by all the people seeing them, and she felt like her body was “basically shown to the whole world.” 4 RR 16. She also knew that Appellant’s co-

¹ Appellant gave B.W. the alcohol to drink while telling her it was lemonade. 4 RR 12-14.

worker had found the pictures on the flash drive, and she felt bad because “my body’s being shown to everybody and it shouldn’t be.” 4 RR 37.

Plano Police Detective Jeff Rich, with the Family Violence Division, testified that B.W.’s pictures were sent to the National Center for Missing and Exploited Children to monitor whether they were being traded. 6 RR 50-51. When a victim is traded, the Center notifies her. 6 RR 54. So when a photo is traded thousands of times, the victim is getting call after call. 6 RR 54-55. Victims who are traded experience enormous trauma every day, not knowing when someone is going to tell them he saw their picture on the internet. 6 RR 56. B.W. testified that she was afraid of getting a call from the Center telling her someone had her pictures, and she worried that in thirty years people she knows might see her body. 6 RR 84-85.

Appellant had thousands of pictures of child pornography on his computers

When police arrested Appellant and searched his home computer, they found thousands of pictures of child pornography on his home computers. SX 68-72, 75-79. The pictures took up thirteen CDs and DVDs. 6 RR 39, 103. Five of those CDs and DVDs contained pictures from the two computers in Appellant’s bedroom. 6 RR 39, 104. One of the computers had four hard drives (6 RR 28; State’s Exhibit 55), and there were approximately 1600 graphics and forty-four movies on two of the hard drives alone. 6 RR 114-15. Jesse Basham, a computer forensic examiner for the FBI, testified that it was the most pictures he had ever seen in a single child pornography case, where he normally sees only ten to thirty. 6 RR 114.

On one of the hard drives in Appellant's bedroom, there was a text document that categorized the files on the computer. 6 RR 108-109, 112. The file names included:

- "C baby 1" and "C baby 7," from a C baby series that Basham was familiar with and knew to depict very young children (6 RR 112),
- "Raygold" and "Video angels," child pornography series (6 RR 112-13),
- "Real 12 years,"
- "T-cum brother/sister,
- "Vicki sucking with cum shot in mouth,"
- "Shivid pussy pounded," and
- "Father and daughter."

6 RR 113.

Almost all the pornography involved prepubescent children, some extremely young, with several very close-up images. 6 RR 118. The pictures depicted children with adult men, children with adult women, and children with children, and they included every sex act imaginable. 6 RR 118-19. Some of the pornography was entered into evidence, showing a range of perverted interests (SX 75-77):

- *Pornography relating to fathers and daughters.* 6 RR 164. For example, "Daddy gets blown," "Young for dad," "Fuck me daddy," "Family slut," "At dad's," "11 daddy teach," "Pedo 13 try dad," "Family sex 2," and a video called "Eight year old rides grandpa." 6 RR 164-65.
- *Pornography relating to mothers and sons.* 6 RR 166. For example, a mother with what appears to be her two sons, "Boy/mom," "Two mom suck," "12 and mom," "Boy/mom eight," and a mother and son in front of a Christmas tree. 6 RR 166. Dan Powers, head of clinical programs with the Collin County Children's Advocacy Center, was greatly concerned about this category of pornography given Appellant's continued relationship with women who had children, both because Appellant could gain access to the children and because he could convince women to participate in sexual acts with their children. 6 RR 167.
- *Pornography relating to mothers and daughters.* 6 RR 167. For example, a mother teaching her daughter to perform oral sex on her son and a mother with

her very young daughter. 6 RR 167. According to Powers, Appellant's arousal to mothers having sexual contact with their daughters places the daughters in jeopardy of abuse by Appellant as well as by their mothers. 6 RR 168.

- *Pornography relating to children on children.* 6 RR 168. For example, "09 cowgirls," "Tina and Lousie," "Dirty little girls together," two little girls engaged in a sex act, and "Loving children." 6 RR 170. Powers noted that, for a child engaged in sexual acts with another child, the shame factor is increased tenfold. 6 RR 170.
- *Pornography relating to preteen orphans.* 6 RR 170. Powers noted that a pedophile interested in this type of pornography is aroused by the fact that there is no one to take care of the children. 6 RR 170. Powers noted that an offender who can be aroused by images of unprotected, orphaned children has no empathy for the child and would be a great risk to society. 6 RR 171.
- *Pornography relating to children in distress.* 6 RR 171, 178-81. For example, a child on all fours being demeaned, a young boy being ejaculated on, children being raped and defecated on, a child urinating on an adult male, children smeared with semen, the administration of enemas, a bottle inserted into a vagina, and a stick or rod being inserted into the anus or vagina. 6 RR 180.
- *Close-up pictures.* 6 RR 171-72, 175-76. Numerous pictures depicted very close-up shots of a child's genitals spread apart or a child's eyes. 6 RR 171-72, 175-76. Powers noted that in those close-up shots, the offender is right there with the child so he can masturbate to the pictures. 6 RR 172, 176.
- *Pictures that normalize the behavior.* 6 RR 172, 176. For example, two children eating a popsicle, an adult female giving access to an adult male with the children present, and a child watching pornography. 6 RR 172, 176, 183.
- *Pornography relating to children who are unaware or asleep.* 6 RR 181. For example, a photograph of people behind a child who obviously does not know they are there. 6 RR 180. Powers noted that this exemplifies the pedophile's idea that he can do whatever he wants with a child and the child does not even know. 6 RR 180-81.
- *Pictures showing adult features.* 6 RR 178-79. A series of pictures of a young girl with nails painted and her hands around an adult penis reflects a pedophile adding adult features to a child to sexualize her. 6 RR 178-79.

- *Pornography relating to different age groups.* 6 RR 182-84. For example, “middle school,” “angel 12 year,” “11 radiator,” “11 Kim BJ,” “ten suck,” “nine-year-old fucked hard,” “seven suck,” a video of a seven year old, “bambina sex,” “six nibble,” “six blow,” “six fuck,” a kindergarten sex series, “Look uncle Bobo, I’m a big girl now” series (which included text), “Baby J,” a mother performing oral sex on the penis of an infant. 6 RR 183. Powers noted that a child who cannot speak is the ultimate victim for a pedophile because it cannot tell. 6 RR 184.
- *Miscellaneous pictures showing a variety of other arousals.* 6 RR 173-75. For example, pictures of a clothed girl (Powers noted that pedophiles can be attracted to clothed children), instructional drawings, pictures taken in public places, and pictures labeled “neighbors” and “school girl and teacher.” 6 RR 173-75.
- *Pornography that encourages pain in the children.* 6 RR 185-86. For example, pain being inflicted by a mother on her naked daughter, a neighbor holding the head of child, a man holding the head of child, a video titled “Tied,” children handcuffed and shackled, a little girl about two years old, crying, with a collar around her neck, being penetrated by an adult male, and a young girl with some kind of weapon at her genitals and what appears to be blood on her naked body, with the words “hurt me.” 6 RR 85-186. Powers could not imagine a pedophile more dangerous to children than one who is aroused by this type of pornography. 6 RR 186.

There was text with these pictures, as well, such as one talking about a girl sticking a pen in her vagina and “getting off” and saying she does not mind the pain and likes to see the hole get a bit wider each time. 6 RR 185. To Powers, this was so far at the end of the spectrum of deviance that it is frightening. 6 RR 185.

Powers testified that this was some of the worst child pornography he had seen in the twenty years he had worked in this area. 6 RR 185. And Appellant’s very broad arousal pattern puts him at greater risk to society. 6 RR 183-84.

Witnesses testified about pedophiles and Appellant’s continued danger to society

At the punishment stage of trial, witnesses testified about pedophiles in general and Appellant’s continued threat to society. Rich testified that traders and collectors of

child pornography collect the images as a series like baseball trading cards. 6 RR 40. There are websites that give child molesters advice and share experiences on what has worked and has not worked in victimizing a child, how to groom a child, how to get a child to trust and stay close to the molester, and how to avoid getting caught by the police. 6 RR 42-45. Trade groups within child pornography rings are very covert and difficult to detect. 6 RR 42-43. And organizations like the National Man/Boy Love Association advocate for adults to be able to have sex with children. 6 RR 43-44.

In Detective Rich's experience, a pedophile is not likely ever to be satisfied with just looking at two-dimensional images of children. 6 RR 48. And the more pornography they look at, the more their desire for children is fed. 6 RR 49. Rich testified about the Butner Federal Penitentiary study that revealed that more than 80% of people in jail for possession of child pornography admitted to having more than twenty-seven actual victims who had not been identified at the time of their incarceration. 6 RR 46-47. Rich does not believe a pedophile can ever be rehabilitated or cured of his arousal for children. 6 RR 49, 63.

According to Powers, there is no age where a deviant arousal such as pedophilia will disappear. 6 RR 144. There are sex offenders who continue to molest into their 70s and 80s. 6 RR 144. They can take pills or can offend with their fingers or mouth. 6 RR 144. And convicted pedophiles frequently find women willing to give them access to their children. 6 RR 211. A pedophile's distorted thinking—they interpret a child's normal behavior as sexual and as directed toward them—makes them dangerous to the community. 6 RR 149-50.

In Powers's opinion, Appellant was a particular risk to society. 6 RR 146-53, 156-57. A sex offender like Appellant who admits his offense and is aroused by the deviant and brutal pornography that Appellant had on his computer should not be around children ever. 6 RR 213-14. The only place Appellant would be safe is in prison, and if he were in society children would not be safe. 6 RR 161-63.

B.W. was affected by the abuse and by the pictures Appellant took

Powers testified at length about the lingering effects of child abuse on the victims, including: inability to trust, shame and guilt, depression, self-sabotage, and self-abusive behavior like cutting or abusing drugs or alcohol. 6 RR 134-37. And when the abuse involves pictures of the victim on the internet, "the door never closes for them." 6 RR 137.

A few weeks before B.W. told about the abuse, she started hitting herself, slamming herself against a wall, and screaming. 3 RR 13; 4 RR 54. At trial, B.W. testified that, because of what Appellant did to her, she cannot trust anyone. 6 RR 79, 81. She worries that if she has children her husband will molest them. 6 RR 81. She is hurt and haunted by what Appellant did to her, and she has to live with it forever. 6 RR 80, 81, 85-86. She does not have any idea how she is going to deal with the abuse, and it scares her to think about it. 6 RR 86. She has talked to people about how to get it out of her head, but it is not working, and she cannot get it out of head. 6 RR 41.

She is afraid that if Appellant is not in prison he could molest his own or other children or trick another mom, and she thinks he should be in prison for the rest of his life. 6 RR 81-83, 85.

Appellant continued to seek out children from jail

When Appellant was in jail waiting this trial, he corresponded with women who had children. SX 73, 74. He asked for pictures of the children, which the women sent, and he asked one of the women to write to him about her four-year-old daughter running around naked after getting out of the bathtub. 6 RR 155; 7 RR 109-110. When he was arrested, he had numerous pictures of children in his wallet, some whose parents he could not remember. 7 RR 104-108; SX 37, 38. And even during trial, he leered at B.W. in the courtroom to the point where she had to be blocked from his view. 6 RR 153.

Appellant testified at the punishment stage of his trial

Appellant testified at the punishment stage of his trial. 7 RR 26-132. He admitted that he was sexually attracted to girls. 7 RR 52, 104. He knew even before he met B.W. that he had an addiction. 7 RR 129-30.

After B.W. confided in him about her sexual relationship with her boyfriend, he became aroused. 7 RR 61, 127; *see also* 7 RR 28. He believed “any man would have been” aroused. 7 RR 61-62. He played the conversation over in his head and “figured out what was going on”: that B.W. was interested in him. 7 RR 60-61, 127. Then he became sexually attracted to her. 7 RR 60. And he believed B.W. was attracted to him, liked him a lot, flirted with him, and teased him. 7 RR 28, 29, 58-59, 37, 127.

He said B.W. would sneak into his room at night when he was trying to sleep “just to mess with me.” 7 RR 41. She would be “aggressive” about it. 7 RR 44, 59. Once, he said, she came in and woke him up and they slid against each other with his penis. 7 RR 42. And B.W. did that when his girlfriend was in bed with him. 7 RR 42. One night B.W. came into his room and the first thing he remembers is waking up aroused with B.W. giving him oral sex. 7 RR 78-79. He also said B.W. swam up to him in a pool and “just grabbed” his penis. 7 RR 100. When B.W. was coming on to him, he said, he had to tell her no on more than one occasion. 7 RR 97-98, 100, 101-102.

He characterized touching B.W.’s vaginal lips as “nothing . . . drastic.” 7 RR 29. He described being excited by being able to get away with taking B.W.’s picture while she was asleep. 7 RR 65-66. And he said he was turned on by seeing the picture of his fingers spreading her vagina apart. 7 RR 74. It excited him to touch her breasts with his

hand because it was “forbidden fruit.” 7 RR 74-75. He liked her body. 7 RR 75. What turned him on about the pornography on his computer was the “situation” the children were in, like when little girls had their mouths on the penises of grown men. 7 RR 117.

Once he warned B.W., “If we did any of this and we get caught, I will go to jail.” 7 RR 45. He understood that when he touched B.W. he could go to jail for life, and even that someone could kill him if they found out. 7 RR 46, 123.

Appellant changed his guilty plea after both parties rested and closed the evidence

Appellant initially pleaded not guilty to all five counts in the indictment. 2 RR 164. The entire guilt/innocence stage of the trial then took place, including B.W.’s testimony. 2 RR 171—4 RR 187. At the outset of Appellant’s closing argument, his counsel told the jury,

Now, I’m going to tell you why we are here for a trial, as offensive as it may be to the State that my client is entitled to plead not guilty in this case. What we’re doing here . . . is called the dialectical method.

5 RR 33-34. He explained that the dialectical method allowed the jury to hear both sides and come to the higher truth. 5 RR 34. He also told the jury he was sorry B.W. had to “get up there and testify” but they needed her to tell her story (5 RR 34) and “sometimes seeing the whole picture is needed in order for you to make certain decisions that you have to make.” 5 RR 35. In the last two sentences of a closing argument that spanned ten pages of the record, Appellant’s counsel announced that Appellant desired to change his plea from not guilty to guilty on all counts. 5 RR 43.

In the State’s closing argument that followed, the prosecutor responded to Appellant’s surprise announcement:

Well, isn't this the damndest thing. So sure the kid wouldn't be able to testify, and now she did that he's changing his plea to guilty. How convenient. How convenient after we've done a whole entire trial, after that baby girl has had to sit there, look him in the eye, having him staring her in the face looking at everyone smugly, knowing that she's not going to be able to do it. Now that she's worked up the courage inside of herself, he decides that it's too risky for him to plead not guilty, and now he wants to tell you that he did it.

5 RR 43-44. Still addressing Appellant's change of plea, she continued:

This is a bunch of nonsense. If I were you I would be mad. I would be real mad. I'm mad. Because what he was trying to do was force you to make a choice. . . . Up until about ten seconds ago, that was the theory of the case. . . . She must have made up [what he had not yet admitted].

5 RR 44. Addressing the impact of the guilty plea, she argued:

I don't understand how he can now say that he did it all and expect for this to change anything about the way that you feel about this case. . . . Does it make him any less dangerous? Does it make him into a better guy? Of course not.

. . . .

What are you going to do with this? How is this going to affect you later? I feel right now like I'm arguing punishment. I guess I kind of am.

5 RR 45-46. Appellant did not object to any part of the prosecutor's argument as it was being presented. After Appellant formally pleaded guilty, the trial court dismissed the jury for the day before it began to deliberate. 5 RR 48, 75.

The next morning, Appellant objected to the prosecutor's closing argument and requested a mistrial. 6 RR 1. Specifically, he objected to the argument that he wanted a jury trial so he could make B.W. take the stand and have to tell her story. 6 RR 1-2. The trial court overruled his objection and denied his request for a mistrial. 6 RR 3.

The punishment stage of the trial then began. During B.W.'s punishment testimony, she repeatedly stated she had been hurt by Appellant pleading not guilty and making her testify when "he could have just said he was guilty." 6 RR 79; *see also* 80, 85. Appellant did not object to this testimony.

SUMMARY OF THE STATE'S ARGUMENT

State's Response to Appellant's Sole Point of Error:

Appellant did not preserve his complaint because he did not object to the prosecutor's jury argument until the day after it was given. Additionally, the complained-of argument was proper both as a reasonable deduction from the evidence and as an answer to the argument of opposing counsel. Finally, looking at the *Mosley* factors, the argument did not prejudice Appellant, particularly in light of the volumes of vile evidence of Appellant's sexual depravity that the jury later heard; Appellant did not request a curative instruction; and Appellant's punishment was certain given the evidence of his abuse of a ten year old, the pornography he created of her, and his massive array of child pornography. Appellant's sole point of error should be overruled.

STATE'S RESPONSE TO APPELLANT'S
SOLE POINT OF ERROR
(JURY ARGUMENT)

Appellant's Contention:

Appellant contends that the trial court erred when it overruled his objection to the prosecutor's closing argument following the guilt/innocence stage of trial. Appellant asserts that it was improper for the prosecutor to imply that he had initially pleaded guilty because he thought B.W. would not have the courage to testify against him.

The State's Short Reply:

Appellant did not preserve his complaint because he did not object to the prosecutor's jury argument until the day after it was given. Additionally, the complained-of argument was proper both as a reasonable deduction from the evidence and as an answer to the argument of opposing counsel. Finally, looking at the *Mosley* factors, the argument did not prejudice Appellant, particularly in light of the volumes of vile evidence of Appellant's sexual depravity that the jury later heard; Appellant did not request a curative instruction; and Appellant's punishment was certain given the evidence of his abuse of a ten year old, the pornography he created of her, and his massive array of child pornography. Appellant's sole point of error should be overruled.

**I. Relevant Law to Determine Error and Harm
and Standard of Review for Denial of Mistrial**

The same factors—the so-called “*Mosley* factors—are used to consider whether an appellant was harmed by an erroneous jury argument and whether the trial court erred by denying a motion for mistrial: (1) the severity of the misconduct (the magnitude of the prejudicial effect), (2) the measure adopted to cure the misconduct (the efficacy of any cautionary instruction by the trial court), and (3) the certainty of the punishment absent

the misconduct.² See *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007); *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Martinez v. State*, 17 S.W.3d 677, 693 (Tex. Crim. App. 2000); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

A trial court's ruling on a motion for mistrial is reviewed for an abuse of discretion. *Archie* 221 S.W.3d at 699; see also *Dukes v. State*, 239 S.W.3d 444, 450 (Tex. App.—Dallas 2007, pet. ref'd). The court will view the evidence in the light most favorable to the trial court's ruling and uphold the ruling if it was within the zone of reasonable disagreement. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007); *Archie*, 221 S.W.3d at 699. A mistrial is required only for "highly prejudicial and incurable errors." *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003) (quoting *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2003)). It is a device for halting trial when error is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins* 135 S.W.3d at 77.

II. Argument and Authorities

A. Preliminary argument: Appellant failed to preserve his complaint for review

As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely and specific request, objection, or motion. See TEX. R. APP. P. 33.1(a)(1)(A). A defendant must object to

² Appellant seems to complain only that the trial court overruled his objection to the prosecutor's argument. However, Appellant's objection was made together with a request for a mistrial, and the trial court ruled on both. In an abundance of caution, the State has addressed both rulings in this brief.

improper jury argument at the earliest possible moment. *Curtis v. State*, 640 S.W.2d 615, 618 (Tex. Crim. App. 1982) (holding a defendant should object to improper jury argument at the time the argument is made through a contemporaneous objection); *Wood v. State*, 152 S.W.2d 335, 338 (Tex. Crim. App. 1941) (noting that objections should be “so made that the attorney making the claimed improper argument may know what is being urged against his argument and be in a position to explain or withdraw it if he has violated the proprieties in the matter”); *Johnson v. State*, Nos. 14-03-00419-CR & 14-03-00420-CR, 2004 WL 414288, at *4 (Tex. App.—Houston [14th Dist.] Mar. 2, 2004, pet. ref’d) (not designated for publication) (holding defendant failed to preserve his jury argument complaint where he did not object until after the State had moved on to discuss another subject).

Likewise, a motion for mistrial must be both timely and specific. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007); *Young v. State*, 137 S.W.3d 65, 65-66 (Tex. Crim. App. 2004). A motion for mistrial is timely only if it is made as soon as the grounds for it become apparent. *Griggs*, 213 S.W.3d at 927; *Wilkerson v. State*, 881 S.W.2d 321, 326 (Tex. Crim. App. 1994). A motion for mistrial made after the conclusion of the jury argument is too late to preserve error. *Williams v. State*, 427 S.W.2d 868, 873 (Tex. Crim. App. 1967); *Barrett v. State*, 900 S.W.2d 748, 750 (Tex. App.—Tyler 1995, pet. ref’d); *Klasing v. State*, 771 S.W.2d 684, 688 (Tex. App.—Corpus Christi 1989), *aff’d*, 812 S.W.2d 322 (Tex. Crim. App. 1991); *Bridges v. State*, 656 S.W.2d 505, 508 (Tex. App.—Tyler 1982, pet. ref’d).

Here, Appellant did not make any objection to the State's jury argument or request a mistrial, the day the argument was made. 5 RR 43-46. Rather, he waited until the next morning to object and request a mistrial. 6 RR 1-3. Because he did not raise his objections or request the mistrial at the earliest possible moment, or as soon as the grounds became apparent, the objections and request were untimely. Appellant did not preserve his complaint for review, and his sole point of error should be overruled.

B. The State's argument was not improper

Alternatively, the State's argument was not improper. Trial counsel must "confine their arguments to the record; reference to facts that are neither in evidence nor inferable from the evidence is therefore improper." *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008), quoting *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). Proper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).

Here, the prosecutor's argument was proper both as a reasonable deduction from the evidence and as an answer to the argument of opposing counsel. The evidence showed that Appellant was able to manipulate B.W. and that Appellant told B.W. he would kill her mother if she told anyone he was abusing her. From this evidence, Appellant reasonably could have harbored a hope that B.W. would not have the courage to come to trial and testify against him. It was reasonable for the prosecutor to conclude that Appellant initially pleaded not guilty with the intent of seeing whether his hope

would be fulfilled. *See Quiroz v. State*, 764 S.W.2d 395, 400 (Tex. App.—Fort Worth 1989) (finding the prosecutor’s argument about the defendant’s “true intent” in an assault was a reasonable deduction from the evidence).

Additionally, the prosecutor’s argument was a response to the argument of Appellant’s counsel. His counsel suggested that the trial had been about arriving at a higher truth through the dialectical method (5 RR 33-34) and needing B.W. to testify so the jury could see the whole picture. 5 RR 34-35. To counter this lofty sounding justification for why he engaged in the highly unusual tactic of waiting to plead guilty until both parties rested and closed, the prosecutor properly suggested that Appellant had other, self-serving motives.

Because the prosecutor’s argument fell within a proper area of jury argument, this point of error should be overruled. Appellant asserts that by speculating about his motives, the prosecutor placed a new fact before the jury. Appellant’s Brief at 6. But the prosecutor was not telling the jury that she knew *for a fact* why Appellant waited to plead guilty. She was merely speculating, based on the facts already in evidence, and her speculation did not constitute a separate, new fact. Again, this point of error should be overruled.

C. Appellant was not harmed, and the trial court did not err in denying his request for a mistrial

Applying the *Mosley* factors, Appellant was not harmed by the complained-of jury argument and the trial court did not err in denying his request for a mistrial:

1. The severity of the misconduct (the magnitude of the prejudicial effect)

The prosecutor's argument did not prejudice Appellant. Coming on the heels of Appellant's surprise change of plea, the jury would have seen the argument simply as the prosecutor's attempt to understand the unusual twist the trial had taken. And if the jury was initially prejudiced by the display of her frustration, that prejudice was diffused when the prosecutor's sentiments were echoed by B.W. in her punishment-stage testimony. 6 RR 79, 80, 85. Additionally, when the prosecutor focused her argument on Appellant's punishment, she asked only that the jury not be merciful to Appellant because of his twelfth-hour plea; she did not ask the jury to be harsher on him. 5 RR 45-46. And in any case, between the complained-of argument and the jury's deliberations on punishment, the jury heard and saw volumes of vile evidence of Appellant's sexual depravity that far overshadowed whatever came before.

2. The measure adopted to cure the misconduct (the efficacy of any cautionary instruction by the trial court)

The trial court did not take any curative measures. But Appellant cannot benefit from the absence of a curative instruction since he did not ask for one. *See Archie*, 221 S.W.3d at 702 (Keller, P. J., concurring) ("If the defendant was entitled to a better instruction, he should have requested it. . . . [The appellate court should analyze the issue] in light of the most protective instruction the defendant was entitled to receive.").

3. The certainty of punishment absent the misconduct

Absent the prosecutor's complained-of argument, Appellant's punishment was certain. The evidence showed Appellant to be a depraved pedophile who had already scarred one victim and would pose a danger to society his whole life. Already aware that

he had a sexual addiction to girls, Appellant chose to become a “father figure” to a ten-year-old girl with little family structure. 3 RR 56, 102; 4 RR 6, 47; 7 RR 52, 104, 129-30. In short measure, he began to misuse her body in an array of sexual activity, all the time engaging in the perverted illusion that she was attracted to him. 4 RR 16-24, 26, 29-30; 7 RR 28, 29, 37, 58-59, 127. Even at his trial, when he presumably would want the jury to see him in the best light, he could not help but portray B.W. as the initiator of much of the sexual contact, showing the incurable depth of his depravity. 7 RR 41-42, 44, 59, 78-79, 100. He added exponentially to the abuse by creating pornographic images of B.W., so that a single day of her life will not pass without her having to wonder what stranger is becoming sexually aroused looking at her body. SX 2-5, 6-35. And he revealed a core of dangerous perversity when he admitted becoming aroused by the pictures he took while B.W. was sleeping. 7 RR 66. An experienced witness and B.W. herself testified about the debilitating effects she has suffered and will continue to suffer because of Appellant. 6 RR 41, 79-83, 85-86, 134-37.

To add a horrifying layer to the abuse of B.W., Appellant is an avid collector of child pornography. SX 68-72, 75-79. And the thousands upon thousands of images—the most and the most depraved that the experienced witnesses had seen—included unspeakable, dehumanizing sexual acts. 6 RR 114, 185. The quantity and nature of his pornography show Appellant to be a grave danger to children. And experienced witnesses testified that the only way to protect children from Appellant was to keep him in prison. 6 RR 49, 53, 144, 146-53, 156-57, 161-63, 213-14. Given the pornography, and all the other evidence, Appellant’s lengthy sentences were certain.

In sum, the first and third *Mosley* factors weigh heavily against Appellant, and the second should weigh against him because he failed to request a curative instruction. Appellant was not harmed by the complained-of jury argument, and the trial court did not err in denying his request for a mistrial. Again, Appellant's sole point of error should be overruled.

CONCLUSION AND PRAYER

Appellant's trial was without prejudicial error. The State prays that Appellant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the State's brief has been mailed to counsel for Appellant, Hunter Biederman, 2591 Dallas Parkway, #300, Frisco, Texas 75034, on this, the 16th day of October, 2009.

/s/ Katharine K. Decker
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